

This handbook section provides guidance on applications filed by institutions that wish to engage in trust and asset management activities, pursuant to Section 5(n) of the Home Owners' Loan Act of 1933 (HOLA) (12 U.S.C. § 1464(n)). Section 5(n) provides that the Director of the Office of Thrift Supervision (OTS) has the authority to grant Federal savings institutions the right to act as trustee, executor, administrator, guardian, or in any other similar fiduciary capacity in which state banks, trust companies or other financial institutions that compete with institutions are permitted to act. OTS regulations (12 C.F.R. Part 550) implement these and other provisions of Section 5(n) that relate to requirements for the proper exercise of trust powers and the surrender and revocation of those powers.

Pursuant to 12 C.F.R. § 550.70, Federal savings institutions and any majority-owned subsidiary must apply for and receive OTS approval in order to act in a fiduciary capacity, unless exempted under 12 C.F.R. § 550.580. State-chartered institutions and their subsidiaries do not need OTS prior approval, but must conduct fiduciary operations in accordance with applicable State law and exercise fiduciary powers in a safe and sound manner.

State-chartered institutions should follow the standards for the exercise of fiduciary powers outlined in 12 C.F.R. Part 550.10(b).

An institution may terminate its trust powers by filing a certified copy of its board of directors' resolution signifying this change and must file the resolution with OTS under 12 C.F.R. § 516.1. See 12 C.F.R. §§ 550.530-50.

FILING REQUIREMENTS

Delegated Authority

Generally, applications filed under this section may be processed by the Regional Office under delegated authority. Applications that are not delegated to the Regional Office are those that raise a significant issue of law or policy or request approval of waivers of statutes, regulations, OTS policy or significant application requirements. See Delegation Section 040 of the handbook for information on the delegation process.

Expedited and Standard Processing Procedures

This application is not subject to the expedited processing procedures set forth in 12 C.F.R. Part 516. Accordingly, the request for trust powers will be processed utilizing the procedures set forth in 12 C.F.R. §§ 516.210-516.290.

Prefiling Meeting Requirements

Prefiling meetings are not required for this filing. However, applicants are encouraged to contact the Regional Office, particularly in the event the transaction involves unique or novel issues, to determine if a prefiling meeting will expedite the application review process.

Information and Form Requirements

If delegated, all applications should be filed with the appropriate Regional Office in accordance with 12 C.F.R. Part 516. The applicant is required to file the original and two conformed copies of each application and the appropriate application fee. All copies are to be clearly marked as to the type of filing, and should contain all exhibits and other pertinent documents. One copy must contain original signatures on all executed documents. For applications that are not delegated to the Regional Office, an additional three copies of the application should be filed with the Applications Filing Room in OTS-Washington.

The applicant is required to submit all documents and information set forth in OTS Form 1240. The application form addresses seven categories of information requirements:

- General
- Legal Requirements
- Management
- Policies and Procedures
- Affiliated Transactions
- Marketing
- Trust and Asset Management Business Plan

The applicant may exercise only those trust powers specified in the OTS approval, and unless otherwise provided in the OTS approval, may perform core fiduciary functions only from those offices listed in the application.

Confidentiality

The applicant must submit in writing, concurrently with the submission of the application, any requests to keep specific portions of the application confidential. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of information. OTS will not treat as confidential the portion of an application describing the plan to meet the Community Reinvestment Act objectives.

Information for which confidential treatment is requested should be: (i) specifically identified in the public portion of the application by reference to the confidential section; (ii) separately bound; and (iii) labeled “confidential.” The applicant should follow these same procedures when filing supplemental information to the application. OTS will determine whether information designated as confidential must be made available to the public under the Freedom of Information Act. OTS will advise the applicant before it makes information designated as confidential available to the public.

Special Considerations

Institutions do not need OTS approval for trust powers to engage in one of the following fiduciary capacities:

- Trustee of a trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan qualifying for specific tax treatment under Section 401(d) of the Internal Revenue Code of 1954 (IRC).
- Trustee or custodian of an Individual Retirement Account within the meaning of Section 408(a) of the IRC.
- Trustee of a fiduciary account that involves no active fiduciary duties provided that the applicable law authorizes the institution to act in this capacity.

Eligibility Examinations

If the application includes the acquisition of all or part of an ongoing trust operation, OTS should request the most recent examinations conducted by the federal or state banking or trust regulator. If a significant amount of time has passed since the last examination, i.e. six months or more, OTS may require an eligibility examination to be conducted. An examination may also be warranted if there were significant areas of supervisory concern noted in the last examination, and a review of the institution's operations is necessary to determine if action had been taken to correct the deficiencies.

The Regional Office should determine the need for an eligibility examination as early in the application process as possible. The eligibility examination may include on- or off-site activities. Prior to commencing the on-site work, OTS will forward a Preliminary Examination Response Kit requesting more detailed information that should be made available to the examiners upon their arrival. OTS does not normally charge a fee for its eligibility examination. However, OTS may impose an hourly fee if the examination encounters significant problems that require additional review beyond the scope of a standard eligibility examination.

REVIEW GUIDELINES

Processing Procedures and Time Frames

As noted in the Delegated Authority section, certain applications are not subject to delegated authority and are processed concurrently with OTS-Washington staff. As a general matter, correspondence from OTS regarding applications that are nondelegated will be transmitted from OTS-Washington. Correspondence on delegated applications will generally come from the Regional Office.

Within five business days of receipt of the application and the application fee, the Regional Office must notify the applicant of the application's receipt. The appropriate application fee must accompany each application in order for it to be considered filed. For nondelegated applications, the application will not be considered filed until received by both OTS-Washington and the Regional Office.

For nondelegated applications, a copy of the application must be provided to the OTS-Washington trust specialist.

Within 30 calendar days of receipt of a properly submitted application, OTS shall take the following actions.

- Deem the application complete,
- Request, in writing, any additional information necessary to deem the application complete, or
- Decline to further process the application if it is deemed by OTS to be materially deficient and/or substantially incomplete.

Failure by OTS to act within 30 calendar days of receipt of the application for processing shall result in the filed application being deemed complete, commencing the period for review.

OTS must review requests for a waiver of an application requirement that certain information be supplied, in a timely manner. Unless OTS requests, in writing, additional information about the waiver request, or denies the waiver request, the waiver request shall be deemed granted.

If additional information is requested, a response must be submitted within 30 calendar days of the letter requesting such information. The applicant may, in writing, request a brief extension of the 30-calendar day period for responding to a request for additional information, prior to the expiration of the 30-calendar day time period. OTS, at its option, may grant the applicant a limited extension of time in writing. Failure to respond to a written request for additional information within 30 calendar days of such request may be deemed to constitute withdrawal of the application or may be treated as grounds for denial or disapproval of the application.

After the timely filing of any additional information in response to an initial or subsequent request by OTS for additional information, OTS has 15 calendar days to review the additional information for completeness or appropriateness and take one of the following actions.

- Request, in writing, any additional information necessary to deem the application complete,
- Deem the application complete, or
- Decline to further process the application if it is deemed by OTS to be materially deficient and/or substantially incomplete.

The 15-day review period commences when the OTS receives a response that purports to respond to all questions in the information request. OTS may extend the 15-day review period for an additional 15 calendar days, if OTS requires the additional time to review the response. OTS will notify the applicant that it has extended the period before the end of the initial 15-day period.

Failure by OTS to act within 15 calendar days of receipt of the additional information shall result in the filed application being deemed complete, commencing the period for review.

If OTS decides to conduct an eligibility examination, it will not deem an application complete until it concludes the examination. In addition, OTS may request additional information as a result of the eligibility examination that must be submitted in accordance with the time frames set forth in this section.

Once the application has been deemed complete, there is a 60-calendar day review period during which time OTS will take into consideration all factors present in the application and render a decision thereon. If, upon expiration of the 60-day review period, assuming no extension has been granted, OTS has failed to act, the application is deemed approved automatically, and the applicant may thereafter consummate the transaction. If multiple applications are submitted in connection with one transaction, the applicable review period for all applications is the review period for the application with the longest review period, subject to statutory review periods.

During the review period, OTS may request additional information if the information is necessary to resolve or clarify the issues presented in the application. OTS may also notify the applicant that the application is incomplete and require that the applicant submit additional information to complete the application. The review period can be extended an additional 30 calendar days if OTS determines that additional time will be required to analyze the proposed transaction. In such cases, OTS must notify an applicant before the expiration of the period for review. In situations in which an application presents a significant issue of law or policy, OTS may extend the applicable period for review of such application beyond the time period for review. In these cases, written notice must be provided to an applicant no later than the expiration of the time period.

For purposes of calculating processing time frames, OTS does not include the day of the act or event, in determining the date the time period commences. In determining the conclusion of a time period, when the last day of the time period is a Saturday, Sunday, or a Federal holiday, the last day will become the next day that is not a Saturday, Sunday, or Federal holiday.

Under 12 C.F.R. § 516.290, if OTS has not acted on a pending application within two calendar years after the filing date, OTS may deem the application withdrawn unless OTS determines that the applicant is actively pursuing a final determination on the application. Applications that are subject to this withdrawal provision are those that have failed to timely take action such as filing required additional information, or OTS has suspended processing of an application based on circumstances that are, in whole or in part, within the applicant's control and have failed to take reasonable steps to resolve these circumstances.

Regulatory Criteria

In determining whether to approve, conditionally approve or disapprove an application under delegated authority, OTS must take into consideration the factors set forth in 12 C.F.R. § 550.100.

- The institution's financial condition: If it does not meet the standards prescribed by state law, and OTS has determined that such condition is not sufficient to support the proposed trust operations, trust powers shall not be granted.
- The institution's capital and whether it is sufficient under the circumstances.

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- The institution's overall performance.
 - The trust powers the institution proposes to exercise.
 - The nature of the supervision to be given trust and asset management activities, including the qualifications, experience and character of the officers of the proposed trust department.
 - The availability of legal counsel to provide advice on trust and asset management matters.
 - The needs of the community for the fiduciary services and the probably volume of such fiduciary business available to the institution.

Decision Guidelines

The statutory and regulatory requirements are designed to ensure the viability and safe and sound operation of the institution. In general, the analysis should conclude that capital is sufficient to engage in the trust activities and management has the necessary expertise and controls to implement the trust activities. In addition, OTS should conclude that the needs of the community for fiduciary services will be served and that the trust activities will be done in compliance with applicable rules and regulations. If, based upon the review, OTS has determined that the fiduciary activities will adversely effect or jeopardize the financial well being of the institution or be detrimental to the community; a denial recommendation may be the course of action. OTS should consider the following factors in analyzing the application to determine if the transaction satisfies the applicable statutory and regulatory criteria for approval:

- Did the applicant submit the following forms and information?
 - * Appropriate and properly executed application OTS Form 1240.
 - * Apply for only those trust powers that the applicant intends to engage in during the first three years of trust operations.
 - * Detailed information regarding each trust officer and manager.
 - * Information on each member of the Trust, Audit and Investment Committees
 - * Three-year trust and asset management business plan.
 - * Legal opinion of independent counsel stating that the proposed trust powers are authorized for state-chartered trust companies by the law of each state where the institution will conduct core fiduciary activities, pursuant to 12 U.S.C. § 1464(n)(1).
 - * Certification that the institution's financial condition, including net worth and statutory reserves, satisfy the requirements of state law for state-chartered trust companies.
 - * Board of Director resolution approving the exercise of trust powers by the institution, subordinate organization, or affiliate, that adopts the Statement of Principles of Trust Department Management.

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- * Submit written policies and procedures for ensuring compliance with 12 C.F.R. § 550.140.
 - * Copies of all proposed contracts with affiliates.
- Will the institution meet capital requirements and make deposits consistent with state law requirements for state-chartered corporate trust companies in each state in which the institution performs core trust activities, pursuant to 12 U.S.C. § 1464(n)(5) and (8)?
 - Do the board of directors and senior management have the qualifications and experience to properly oversee and administer the proposed trust activities?
 - Do the trust officers have the necessary expertise and experience to conduct the trust and asset management activities in a safe and sound manner?
 - Will the trust department have adequate staffing, given the level of activities? If dual employees are to be utilized, will these individuals allocate sufficient time to meet their responsibilities to the institution and to its trust customers?
 - Will the institution have adequate legal representation with respect to its trust operations? Does counsel have adequate experience in trust activities?
 - If the institution will exercise investment discretion, are there personnel with the necessary investment expertise to make such decisions? How will the institution monitor the investment decisions? Will the institution outsource some or a portion of these investment decisions? If so, are the personnel at the institution able to monitor these investment service providers? If required to do so, will the institution register as an investment adviser under the Investment Adviser Act of 1940?
 - Does the institution have sufficient capital relative to the risks associated with the proposed trust and asset management activities? Will losses adversely impact the financial well being of the institution?
 - Are the institution's trust and asset management business plan and its underlying assumptions reasonable?
 - Will the recordkeeping requirements for fiduciary accounts meet the requirements of 12 C.F.R. §§ 550.410 – 430?
 - Will the audit program for the trust department comply with the requirements of 12 C.F.R. §§ 550.440 - 480? Do the internal and external auditors have the necessary expertise and independence to conduct their reviews in an objective manner?
 - Has the institution developed a compliance management program that ensures compliance with applicable laws, regulations and sound fiduciary principles? Does the program provide for the assignment of specific responsibilities to staff, training of staff, routine self-evaluations, periodic compliance audits and written policies and procedures?
 - Has management developed a risk management program to identify, measure, monitor and control risks in the proposed trust and asset management activities?

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- Will the trust activities result in a transaction with an affiliate? If so, will the arrangements comply with 23A and 23B of the Federal Reserve Act, 12 U.S.C. §§ 5 and 1468 of the HOLA and 12 C.F.R. §§ 563.41 and 563.42?
 - If the institution or its affiliates have proprietary mutual funds or propose to use an affiliated broker-dealer, has the applicant developed procedures to ensure compliance with 12 C.F.R. § 563.42(b)?
 - Does applicable state law allow discretionary assets to be invested in proprietary mutual funds or other products offered or provided by an affiliate? If so, will the fees for trust accounts invested in proprietary products be adjusted? Are the fees received by the institution and/or its affiliates reasonable?
 - Will the proposed trust and asset management activities be available to the general public?
 - Will the institution and its affiliates comply with the anti-tying restrictions of 12 U.S.C. §§ 1464(q) and 1467a(n)?
 - Will the institution pay referral or finders' fees for the referral of trust business? If so, will these fees comply with Thrift Bulletin 76-1?
 - Will the institution or its affiliates receive any fees from third-party mutual funds that will be offered as an investment choice for employee benefit plans and/or participants?

Conditions

Applications for trust powers are not subject to standard approval conditions. However, it is not unusual for the approval of an application for trust powers to contain nonstandard conditions of approval. Additional conditions may be warranted in circumstances where the proposed trust operations are integrated with services or activities involving affiliates, where securities affiliates exist, where anti-tying issues are present, or due to unique characteristics or the risk profile of the proposed fiduciary activities. All nonstandard conditions of approval must be supported with justification in the recommendation memorandum related to approval of the application. Listed below are examples of frequently seen nonstandard conditions:

- At least 50 percent of the institution's audit, trust and investment committees must be directors who are not officers or employees of the institution, the holding company or any affiliates. If compliance with this condition involves the selection of additional directors, each director must receive the prior written approval of the Regional Office;
- The institution must operate within the parameters of its business plan. The holding company and the institution must submit any proposed major deviations or material changes from the plan (including changes resulting from decisions made by the holding company), and in particular, those pertaining to cross-marketing by the institution and its affiliates, for the prior written non-objection of the Regional Director. The request for change must be submitted a minimum of 60 calendar days before the proposed change is implemented with a copy sent to the FDIC Regional Office;
- Within 30 calendar days after each calendar quarter, the institution must submit to the Regional Office quarterly activity reports on the number and type of trust accounts serviced,

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- the total asset values of these accounts, and the minutes of the meetings of the institution's Trust Committee;
- Prior to engaging in any fiduciary activity, the institution must develop and submit to the Regional Office for review a functioning oversight program, consisting of a comprehensive audit program, a compliance management program, and a risk management program. The audit program must be fully implemented prior to the commencement of operations. The compliance management program must be fully implemented within 90 days of commencement of operations. The risk management program must be fully implemented within 180 days of commencement of operations;
 - * The audit program should address auditor qualifications, audit scope and method, committee involvement, reporting, and the process for effectuating corrective action.
 - * The compliance management program should ensure compliance with applicable laws, regulations, and sound fiduciary principles. It should include, at a minimum: (a) the assignment of specific compliance responsibilities to experienced staff; (b) training for affected staff; (c) routine self-evaluations; (d) periodic compliance audits; and (e) appropriate written policies and procedures.
 - * The risk management program should establish criteria to identify, measure, monitor, and control risks within the fiduciary activities.
 - **(For limited purpose, trust-only applicants.)** Prior to engaging in any business activity other than that authorized pursuant to section 5(n) of the HOLA, the institution must apply to the OTS and receive approval of its application to engage in such business activity. The OTS will consider any such application under the standards required of a new federal thrift charter which are set forth at section 5(e) of the HOLA and OTS regulations thereunder, and under the Community Reinvestment Act and OTS regulations thereunder at 12 C.F.R. § 563e.29. Any such application may be subject to the public notice and comment procedures set forth at 12 C.F.R. Part 516, Subparts B and C;
 - **(For institutions that will market its products through its affiliates or cross-market products.)** The holding company, its affiliates and the institution must comply with the anti-tying restrictions of 12 U.S.C. §§ 1464(q) and 1467a(n) and must develop written procedures to effect such compliance. The procedures must be submitted for the review and nonobjection of the Regional Office prior to establishing the trust operations (alternative language if not cross marketing at the onset of business: at least 30 calendar days prior to the commencement of the cross-marketing activity);
 - **(For institutions that use affiliate mutual funds in instruments governed by ERISA.)** The institution must submit a reasoned opinion of counsel to the Regional Director, within 90 days following the commencement of operations, that the institution has included in its planned investment decision process measures that address the inherent conflicts associated with investing in proprietary or affiliated mutual funds. Such measures should ensure that the investments are authorized under applicable law (including the Employee Retirement Income Security Act of 1974), subject to written policies and procedures, and appropriate for each individual account. The institution must also document its decision-making process and provide disclosures regarding the fee arrangements;

- **(If the institution proposes to conduct discretionary activities or will provide any investment advice, the following condition must be included.)** The institution must comply with all applicable state and federal securities laws, relating to any requirements for registration as an investment advisor and submit evidence of such compliance acceptable to the Regional Director;
- **(For institutions that have “securities affiliate(s)”, as defined below, the following two conditions must be included.)** A majority of the institution’s board of directors must not be comprised of individuals who are directors or employees of any affiliate of the institution that engages in securities brokerage, securities dealing, investment company, or investment advisor activities (Securities Affiliate(s));
- The institution is prohibited from sharing common officers with any Securities Affiliate unless prior written approval is obtained from the Regional Director, which shall be based on criteria such as regulatory compliance, experience, character, integrity and the ability to perform both duties.

Any nonstandard conditions incorporated into the approval letter must be summarized in the National Applications Tracking System record for the application. This requirement helps OTS to provide the public a complete listing of all applications approved with nonstandard conditions of approval.

RECORDKEEPING REQUIREMENTS

OTS is required to consolidate all correspondence related to the processing of the notice or application into a file copy to be sent to a central file. Both the Regional Office and OTS-Washington will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation memorandum, and compliance material. The file copy must be organized and separated into public and confidential material, and clearly identified as such. The public and confidential sections must be arranged in chronological order.

MONITORING AND CONTROL

The approval order or letter will generally include conditions of approval. The Regional Office will monitor compliance with all conditions imposed in connection with an application’s approval. The applicant must submit evidence of satisfaction of the conditions included in the approval order or letter to the Regional Office within the stated time frames.

OTS should notify the appropriate staff responsible for the supervision and examination of the institution regarding the action taken on an application. In addition, OTS should provide the appropriate staff with copies of the approval order or letter. If an application is approved, the first examination of the institution following the approval should include a review of compliance with all conditions of approval and any changes in operations as a result of the transaction.

A review of the application file should be made after all compliance material is received to ensure that the file is complete. Any deficiencies should be corrected before the file is sent to storage.

OTS-Washington may conduct a post audit review of the application in the Regional Office, including a review of the documentation maintained in the application file.

INFORMATION SOURCES

Statutes

12 U.S.C. § 1464(l)	HOLA Section 5(l); Retirement Accounts
12 U.S.C. § 1464(n)	HOLA Section 5(n); Trusts
12 U.S.C. § 1464(q)	HOLA Section 5(n); Tying Arrangements
12 U.S.C. § 1468	HOLA Section 11; Transactions with Affiliates

Regulations

12 C.F.R. Part 516	Applications Processing Guidelines
12 C.F.R. Part 550	Trust Powers of Federal Associations
12 C.F.R. § 563.41	Loans and other transactions with affiliates and subsidiaries
12 C.F.R. § 563.42	Additional standards applicable to transactions with affiliates and subsidiaries
12 C.F.R. § 563.43	Restrictions on Loans and Other Investments Involving Affiliated Persons
12 C.F.R. Part 565	Prompt Correct Action
12 C.F.R. Part 567	Capital

Other

OTS Regulatory Handbook	Trust Activities
Thrift Bulletin 76-1	Paying Finders' or Referral Fees
23A and 23 B of the Federal Reserve Act	Transactions with Affiliates
Thrift Bulletin 48-17	Fees and Assessments
New Directions 99-7	Eligibility Exam Procedures

Forms

OTS Form 1240	Application for Trust Powers
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